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**IN THE
COURT OF APPEALS OF INDIANA**

DONALD L. WORTH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 28A04-0611-PC-634

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Judith L. Dwyer, Judge Pro Tempore
Cause No. 28C01-0306-PC-94

May 11, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Donald L. Worth (Worth), appeals the summary denial of his petition for post-conviction relief.

We reverse and remand.

ISSUE

Worth raises one issue on appeal, which we restate as follows: Whether the post-conviction court erred in summarily denying his petition for post-conviction relief without issuing findings of fact and conclusions of law and without holding an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

On September 6, 2001, Worth was found guilty of attempted murder, I.C. § 35-41-5-1. On October 24, 2001, Worth was sentenced to thirty-five years imprisonment with five years suspended, for a total executed sentence of thirty years. On December 18, 2002, this court affirmed the conviction and the sentence on direct appeal in a memorandum opinion in *Worth v. State*, 28A05-0201-CR-7. On June 27, 2003, Worth filed a *pro se* Petition for Post-Conviction Relief. On May 1, 2006, Worth, through counsel, filed an amended petition and a motion to set hearing. The court set a hearing for August 24, 2006. On May 25, 2006, the State filed its Response to Worth's motion to set hearing asking the court to summarily deny the Petition for Post-Conviction Relief. On June 8, 2006, Worth filed a Verified Response to State's Request for Summary Denial. On June 12, 2006, the State filed State's Response to Worth's Verified Response to State's request for Summary Denial asking again that the trial

court summarily deny the Petition for Post-Conviction Relief. On July 11, 2006, the trial court summarily denied the Petition for Post-Conviction Relief and vacated the August 24, 2006 hearing. On July 25, 2006, Worth filed his Motion to Correct Error which was deemed denied after forty-five days.

Worth now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Worth contends that the trial court erred in summarily denying his petition for post-conviction relief. On the other hand, the State contends that although the case must be remanded for the entry of findings of fact and conclusions of law, Worth is not necessarily entitled to an evidentiary hearing. We agree with Worth.

I. Evidentiary Hearing

First, we find that Worth is entitled to an evidentiary hearing. A petition for post-conviction relief may be summarily denied “if the pleadings and the record conclusively demonstrate that there is no genuine issue of material fact and the petitioner is not entitled to relief.” *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004). An evidentiary hearing is not necessary when the pleadings show only issues of law. *Id.* “The need for a hearing is not avoided, however, when a determination of the issues hinges, in whole or in part, upon facts not resolved.” *Gann v. State*, 550 N.E.2d 803, 804 (Ind. Ct. App. 1990). Thus, a hearing is still needed even if the petitioner’s chance of establishing his claim is remote. *Id.* at 804-05.

Here, we find that Worth’s claim of ineffectiveness of appellate counsel for failure to claim that his trial counsel was ineffective for not tendering jury instructions as

to the affirmative defense of abandonment raises a genuine issue of material fact. Effectiveness of counsel is an evidentiary issue and the particular facts of each case are important to the resolution. *Clayton v. State*, 673 N.E.2d 783, 786 (Ind. Ct. App. 1996). “Typically, an evidentiary hearing is required to develop all of the facts relevant to the claim, as an ineffective assistance of counsel claim revolves around the unique facts of that case and many of those facts exist outside of the record.” *Hough v. State*, 690 N.E.2d 267, 273 (Ind. 1998). When ineffective assistance of counsel is alleged, summary disposition is erroneous if the facts alleged raise an issue of merit. *Gann*, 550 N.E.2d at 805.

Abandonment is a defense to attempted murder requiring “that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.” I.C. § 35-41-3-10. The question of whether a defendant’s abandonment is voluntary is a question of fact for the jury. *Gravens v. State*, 836 N.E.2d 490,495 (Ind. Ct. App. 2006). Based on the facts as they appear in our memorandum opinion issued December 18, 2002, a genuine issue of material fact exists as to whether Worth “voluntarily abandoned” his efforts. The following facts were found:

When they got to the lake, Worth put [his victim’s] head in the water and held it there. It was muddy and she was kicking to prevent herself from sinking. Dicus eventually managed to raise her head above the water. She noticed that Worth appeared to be just sitting in the water, and she fled.

When she reached the lane, Dicus took off her blue jeans because the water made them heavy. She found her purse on the ground. After walking a little further, Dicus saw the truck. She had heard Worth yelling earlier, and she could tell by his voice that he was far enough away that if

the keys were in the truck, she could get away by taking the truck. She reached her arm in the driver's side window, found the keys in the truck, and drove away.

Worth v. State, Slip Op. pp. 3-4.

It appears from the facts that there is a genuine issue of material fact as to whether Worth voluntarily abandoned the attempted murder.¹ Accordingly, we remand to the trial court with instructions to hold an evidentiary hearing.

II. Specific Findings of Fact and Conclusions of Law

A post conviction court is required to make specific findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. Ind. Post-Conviction Rule 1(6). The post conviction court failed to comply with this rule. Thus, we remand to the trial court with instructions to issue findings of fact and conclusions of law.

CONCLUSION

Based on the foregoing, we find that the post conviction court improperly summarily denied Worth's petition for post-conviction relief. We remand this case for an evidentiary hearing and for the post conviction court to make findings of fact and conclusions of law.²

¹ In his Brief p. 11, Worth claimed "[i]n the Amended Petition, Worth stated that there was 'significant evidence' in the trial record indicating that even if Worth did attempt to kill the victim, he subsequently abandoned that attempt, a fact which must now be accepted as true." The supporting case law, *Allen v. State*, 791 N.E.2d 748, 753 n.1 (Ind. Ct. App. 2003), does not support this proposition as it is instead referring to a T.R.12(c) motion for judgment on the pleadings.

² We will not address Worth's specific allegations of ineffective assistance of counsel as our decision is based on other grounds.

Reversed and remanded with instructions.

NAJAM, J., and BARNES, J., concur.